

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

MAY 12 2009

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2008-0396-PR
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
EARL F. CRAGO,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR94000471

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART AND REMANDED

Earl F. Crago

Tucson  
In Propria Persona

H O W A R D, Presiding Judge.

¶1 Following a jury trial, petitioner Earl Crago was convicted in 1995 of first-degree murder and was sentenced to life imprisonment. We affirmed Crago's conviction and sentence on appeal; denied relief in part on a consolidated petition for review of the denial of his first petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.; and remanded for an evidentiary hearing on two claims of ineffective assistance of counsel. *State v. Crago*, Nos. 2 CA-CR 95-0488, 2 CA-CR 98-0230-PR (consolidated) (memorandum

decision filed Mar. 18, 1999). We subsequently denied relief on Crago’s petition for review of the denial of post-conviction relief after the evidentiary hearing, *State v. Crago*, No. 2 CA-CR 00-0259-PR (memorandum decision filed Mar. 13, 2001), and on his petitions for review of the denial of relief on his second and third petitions for post-conviction relief. *State v. Crago*, No. 2 CA-CR 01-0381-PR (memorandum decision filed Feb. 19, 2002); *State v. Crago*, No. 2 CA-CR 2004-0224-PR (memorandum decision filed Mar. 29, 2005). Crago now seeks review of the trial court’s dismissal of his petition for special action, which the court treated as a petition pursuant to Rule 32, as explained below.<sup>1</sup> “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In March 2008, Crago filed a pro se petition for writ of habeas corpus asserting that, although the trial court had sentenced him to life imprisonment without the possibility of parole for twenty-five years, the Arizona Department of Corrections [ADOC] was instead treating his sentence as “a ‘natural life’ sentence with no release date, and no community supervision [d]ate, and no parole eligibility date.” The trial court found that, “even assuming the truth of all matters set forth in the [habeas corpus] petition, Defendant is not being held illegally at this time, and so *habeas corpus* relief cannot be granted. However, it further appears that the claim . . . may be cognizable in post-conviction relief proceedings under Rule 32.” The court then deemed Crago’s habeas corpus petition to be a petition for post-

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<sup>1</sup>Although Crago filed a notice of appeal from the trial court’s dismissal of his special action petition, this court, perhaps improvidently, redesignated it as a petition for review in light of the trial court’s having treated the underlying petition as one for post-conviction relief.

conviction relief and appointed counsel to represent him and file a supplemental petition for post-conviction relief on his behalf.

¶3 In a written notice to the court, appointed counsel stated he had contacted an individual from ADOC's time computation department who had "avow[ed] that the calculation of Mr. Crago's sentence is being handled in the same way as other persons sentenced to a term of twenty-five to life in the Arizona Department of Corrections." Counsel also told the court he had reviewed the "relevant portions of the record" and had been unable to find "a meritorious issue of law or fact" to raise in a Rule 32 petition. He asked that Crago be given the opportunity to file a pro se petition for post-conviction relief. On November 6, 2008, after Crago had failed to file a pro se petition by the court-imposed deadline, the court dismissed "[t]he notice of post-conviction relief and any pending post-conviction relief proceedings."

¶4 Crago immediately filed a petition for special action, asserting the same claim he had raised in his habeas corpus petition. In a November 14, 2008, minute entry ruling, the trial court noted it had dismissed the post-conviction proceedings on November 6 because Crago had not filed a pro se petition within the time allowed. In the same November 14 ruling, the court dismissed Crago's special action petition on the grounds that the petition had alleged "the same issue previously raised [in the habeas corpus petition] . . . [and Crago] did not present such matters in the form of a pro se petition for post-conviction relief, and he has not filed a petition for review of this Court's order of November 06, 2008."

¶5 To the extent Crago is challenging the trial court's dismissal of the Rule 32 proceeding, we find no abuse of discretion and deny relief. Although the court had deemed

the habeas corpus petition to be a petition for post-conviction relief and had given Crago the opportunity to file a pro se petition, *cf.* Ariz. R. Crim. P. 32.4(c)(2), when Crago failed to file a supplemental petition, he essentially left the court with no issue upon which to rule. For that reason, we find no abuse of discretion in the court's dismissal of the Rule 32 proceeding.

¶6 However, we do find the trial court abused its discretion by dismissing the petition for special action, an entirely distinct pleading from the Rule 32 proceeding. It appears the court essentially consolidated the Rule 32 and special action proceedings and dismissed the latter based on events that had occurred in the former. A Rule 32 petition and special action petition have distinct substantive and procedural limitations. Because Crago is entitled to have the court consider his special action petition independent of the Rule 32 proceeding, we remand for that purpose. We note, however, that our ruling is not intended to suggest Crago's special action claim has merit, only that he is entitled to have the court consider it.

¶7 The petition for review is granted, and this matter is remanded for further proceedings consistent with this decision.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge